Supreme Court, U.S.
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No. 98-495

In The
Supreme Court of the United States
October Term, 1998

EDWARD A. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF OF UNITED STATES

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COUNTERSTATEMENT

This counterstatement is submitted because the Government's Statement of record facts is inaccurate. The factual record establishes that materiality was an essential element in the statutes involved and the issue of materiality was seriously disputed in the District Court. Over objection, the District Court directed the verdict on materiality.

1. Contrary to the Government's statement, "compacted zirconium" is not listed on the Munitions List under the Arms Export Control Ace, 22 U.S.C. 2778 (a)(1). In 1983, the Department of State Office of Munitions Control (OMC) ruled that because zirconium was a dual use item, it was **excluded** from the Munitions List. Appellant's C.A. Br. 13. It was material, and an issue that must have been determined by the jury, whether the zirconium exported required an export license for the Department of State.

2. Contrary to the Government's statement, the principal business of Carlos Cardoen was in the mining industry in Chile. Also, Mr. Cardoen, as part of a secret CIA covert operation known to the Government, pursued international arms sales to Iraq. Appellant C.A. Br. 3-11. In pursuit of that covert operation, Cardoen submitted false end-user statements claiming the compacted zirconium was for industrial explosives used in mining operations. Because of Mr. Cardoen's "cooperation" with the United States, it was an issue whether the false end-user statements were "material" to the granting of the export license since the Government was aware of and facilitated the use.

DISCUSSION

The Government contends that the writ of certiorari should be held and disposed of as appropriate in light of the court's disposition of *Neder v. United States*, No. 97-1985.

Petitioner contents that this case is a more appropriate vehicle to determine the issue whether the district court's failure to allow the jury to consider whether the charged false statements were material can be harmless error. In this case, "materiality" was an essential element of the criminal statute and, contrary to the facts in *Neder*, the issue of materiality was significantly disputed in the trial.

Accordingly, the resolution of the issue in *Neder* will not consider the breadth of the various issues of materiality raised in a context that will provide appropriate guidance to the Circuit Courts of Appeal.

CONCLUSION

This petition for writ of certiorari should be granted. In the alternative, this petition should be granted, consolidated with *Neder v. United States*, No. 97-1985 and considered simultaneously by the Court.

Respectfully submitted,

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